[Cite as *State v. Paton*, 2010-Ohio-5178.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

State of Ohio

Appellee

v.

Jeffery L. Payton

Appellant

Court of Appeals Nos. E-09-070
E-09-071

Trial Court Nos. 2008-CR-611
2009-CR-047

DECISION AND JUDGMENT

Decided: October 22, 2010

* * * * *

Kevin J. Baxter, Erie County Prosecuting Attorney, and
Mary Ann Barylski, Assistant Prosecuting Attorney, for appellee.

Jack Bradley and Brian J. Darling, for appellant.

* * * * *

HANDWORK, J.

{¶ 1} This appeal is from two December 3, 2009 judgments of the Erie County Court of Common Pleas, which sentenced appellant, Jerry Payton, after he enter guilty pleas to various charges and was convicted by the court. Upon consideration of the assignments of error, we affirm the decision of the lower court. Appellant asserts the following assignments of error on appeal:

{¶ 2} "1st ASSIGNMENT OF ERROR: THE STATE'S BREACH OF THE PLEA AGREEMENT ENTERED INTO BETWEEN MR. PAYTON AND THE PROSECUTOR RENDER THAT PLEA INVOLUNTARY AND ITS ACCEPTANCE PLAIN ERROR.

{¶ 3} "2nd ASSIGNMENT OF ERROR: MR. PAYTON IS ENTITLED TO SPECIFICALLY ENFORCE THE PLEA AGREEMENT THAT THE TRIAL COURT EXPLICITY [SIC] ACCEPTED.

{¶ 4} "3rd ASSIGNMENT OF ERROR: THE TRIAL COURT IMPROPERLY SENTENCED MR. PAYTON WHEN IT IMPOSED CONSECUTIVE SENTENCES WITHOUT STATING FINDINGS OR REASONS SUPPORTING ITS SENTENCING DECISION.

{¶ 5} "4th ASSIGNMENT OF ERROR: MR. PAYTON WAS DEPRIVED OF HIS CONSTITUTIONALLY GUARANTEED RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL BY TRIAL COUNSEL'S DEFICIENT PERFORMANCE AT SENTENCING."

{¶ 6} This appeal arises out of two cases in the trial court. In case number 2008-CR-611 (the "2008 case"), the Erie County Grand Jury issued a ten count indictment against appellant. These charges arose out of a September 2, 2008 incident where appellant allegedly prepared and possessed LSD, cocaine, marijuana, and crack cocaine for sale while in the presence of a juvenile. In case number 2009-CR-047 (the "2009 case"), the Erie County Grand Jury issued a seven count indictment against appellant.

The charges arose out of an incident on July 11, 2008, when appellant allegedly restrained someone's liberty; an incident on October 14, 2008, when appellant allegedly restrained the liberty of and caused serious harm to another person; and an incident on December 1, 2008, when appellant allegedly prepared and possessed crack cocaine and cocaine for sale to an intermediate buyer.

{¶ 7} A plea offer was proposed by the state. In exchange for appellant's promise to plead guilty to certain offenses in each case, the state agreed to a recommended sentence of approximately ten years. Following the denial of appellant's motion to suppress, appellant agreed to enter into the plea agreement. On August 10, 2009, appellant entered a guilty plea in the 2008 case to charges of possession of marijuana, preparation of crack cocaine, and possession of crack cocaine. Appellant also entered a guilty plea in the 2009 case to possession of cocaine and crack cocaine. Appellant acknowledged that the maximum prison sentence he faced was 19 years, of which three years were mandatory in the 2008 case and a maximum term of imprisonment of ten years, with a mandatory term of one year in the 2009 case. The prosecution agreed to recommend appellant serve nine years and 11 months with six years mandatory in both cases, with no opposition to judicial release after seven years. At the plea hearing, the court informed appellant the court "will give great deference to the fact that your counsel and the state [are] recommending this [plea agreement], but you have the opportunity to blow this by getting in some trouble between now and then, so don't do that, okay?" To which appellant replied he would not get in trouble and that he had no further questions.

{¶ 8} Appellant did not appear for his sentencing hearing. After appellant was arrested, a sentencing hearing was held on November 30, 2009, and two sentencing judgments were rendered on December 3, 2009, and corrected by a January 15, 2010 judgment in the 2008 case. Appellant's counsel suggested at the sentencing hearing that appellant had probably not appeared at the original hearing because he was frightened by the thought of a long imprisonment. The court found appellant guilty of the charges to which he had entered a guilty plea. In the 2008 case, the court imposed a definite sentence of 11 months as to one count and nine mandatory years for the remaining two counts that merged for purposes of sentencing. The sentences imposed were to be served consecutively. In the 2009 case, the trial court found appellant guilty of the two counts to which he had pled guilty. The court sentenced appellant to serve four years of mandatory imprisonment as to each count, to be served consecutively to each other and consecutive to the sentence imposed in the 2008 case, for a total sentence of imprisonment for 17 years and 11 months. Appellant appeals from both sentencing judgments and the two appeals have been consolidated for our review.

{¶ 9} In his first and second assignments of error, appellant argues that the prosecution violated the plea agreement when it did not recommend the agreed-upon sentence. Therefore, appellant asserts that his guilty plea was not voluntary and acceptance of it by the court was plain error or, in the alternative, that he is entitled to specific performance of the agreement upon remand. Furthermore, appellant argues that

if he breached the plea agreement by not appearing for sentencing, the trial court should have given him the opportunity to withdraw his guilty plea.

{¶ 10} Appellee argues that while appellant entered his guilty plea pursuant to the plea agreement, he did not appear for sentencing. Therefore, the prosecution was no longer required to comply with the plea agreement and make the sentencing recommendation set forth in the plea agreement. We agree.

{¶ 11} "Plea agreements are contracts between the state and criminal defendants and are subject to contract-law principles." *State v. Netherland*, 6th Dist. No. 08CA3043, 2008-Ohio-7007, ¶ 37, reversed on other grounds in *In re Sexual Offender Reclassification Cases*, 126 Ohio St.3d 322, 2010-Ohio-3753, citing *State v. Adkins*, 161 Ohio App.3d 114, 2005-Ohio-2577. Therefore, a breach of the contract by the defendant relieves the prosecution of any obligations under the agreement. *State v. Netherland*, supra, and *State v. Adkins*, supra. The determination of whether the plea agreement has been breached is a matter left to the sound discretion of the court. *State v. Willis*, 6th Dist. No. E-05-026, 2005-Ohio-7002, ¶ 9, and *State v. McCartney*, 12th Dist. No. CA2005-03-008, 2005-Ohio-5627, ¶ 8 citing *State v. Mathews* (1982), 8 Ohio App.3d 145, 146. Failure of appellant to appear at the sentencing hearing is generally held to be a breach of the plea agreement. *State v. Milligan*, 3d Dist. No. 16-08-04, 2008-Ohio-4509, ¶ 16, and *State v. Adkins*, supra, at ¶ 7-8.

{¶ 12} Neither the agreement nor the court must inform the defendant that failure to appear at sentencing constitutes a breach of the agreement. Id. at ¶ 8. Although some

courts also consider what the parties reasonably understood at the time the defendant entered a guilty plea. *State v. Willis*, supra.

{¶ 13} Finally, because there is no absolute right to withdraw a guilty plea after conviction but prior to sentencing, *State v. Xie* (1992), 62 Ohio St.3d 521, 527, a trial court has the discretion to determine whether a defendant shall be allowed to withdraw his plea after failing to appear for sentencing. Generally, courts find that it is not an abuse of discretion to deny the motion to withdraw under these circumstances. *State v. Adkins*, supra, at ¶ 16. Therefore, appellant cannot claim that he was prejudiced by his counsel's failure to move to withdraw the guilty plea under these circumstances. Id. at ¶ 16-18. The court owes no obligation to advise appellant that he could move to withdraw his guilty plea.

{¶ 14} In this case, appellant left the state and did not return for sentencing until after he was apprehended and extradited to Ohio. His counsel even stated at the sentencing hearing that he believed that appellant merely panicked at the thought of the sentence to which he had agreed. Furthermore, while not required to do so, the court warned appellant that the court would not necessarily accept the sentencing recommendations of the agreement if appellant got into further legal trouble. Appellant cannot now complain that he did not know that skipping out on his sentencing hearing would affect his sentence. Appellant has failed to demonstrate that the trial court abused its discretion by finding that the plea agreement had been breached by appellant and that the prosecution was no longer bound by it. Furthermore, the court was not required to

give appellant the opportunity to withdraw his plea. Appellant's first and second assignments of error are not well-taken.

{¶ 15} In his third assignment of error, appellant argues that the trial court erred by imposing consecutive sentences without stating findings or reasons. Appellant argues that the holding of *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, ¶100 (that a trial court has "* * * full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences") has been vacated by *Oregon v. Ice* (2009), ___U.S.___, 129 S.Ct. 711.

{¶ 16} This court has already addressed this issue and found that we are bound to follow the law set forth in *State v. Foster*, supra, until the Ohio Supreme Court holds otherwise. *State v. Lewis*, 6th Dist. Nos. L-09-1224 and L-09-1225, 2010-Ohio-4202, ¶ 57. Therefore, we find appellant's third assignment of error not well-taken.

{¶ 17} In his fourth assignment of error, appellant argues that his counsel rendered ineffective assistance of counsel by failing to assert at the sentencing hearing that the prosecution breached the plea agreement.

{¶ 18} To establish a claim of ineffective assistance of counsel, the defendant must show that his counsel's representation "fell below an objective standard of reasonable representation and, in addition, prejudice arises from counsel's performance." *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraphs two and three of the syllabus citing *Strickland v. Washington* (1984), 466 U.S. 668, 687. To prove ineffective assistance on

the basis of a failure to file a particular motion, a defendant must establish that the motion stood a reasonable probability of success. *State v. Adkins*, supra, at ¶ 14. In this case, appellant's counsel was faced with a very clear violation of the plea agreement by appellant simply because he did not want to be sentenced. Asserting a breach by the prosecution would have been unfounded and unwise. Therefore, we conclude that appellant has failed to demonstrate that his counsel rendered ineffective assistance. Appellant's fourth assignment of error is not well-taken.

{¶ 19} Having found that the trial court did not commit error prejudicial to appellant and that substantial justice has been done, the judgment of the Erie County Court of Common Pleas is affirmed. Appellant is hereby ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Mark L. Pietrykowski, J. _____
JUDGE

Thomas J. Osowik, P.J. _____
CONCUR.
JUDGE